IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 13 OF 1999.

1. Shri Vishwanath B. Borkar,
   agriculturist.

2. Shri Ashok B. Borkar,
   milkman.

3. Shri Chandrakant B. Borkar,
   owner of beedi stall.

4. Shri Damu B. Borkar,
   teacher by profession.

5. Mrs. Vishwanath B. Borkar,
   wife of Apppellant No.1.

6. Mrs. Chandrakant B. Borkar,
   wife of Appellant No.3.

   All residing behind Cine Vishant,
   Malbhat, Margao, Goa. ... Appellants.

VERSUS

1. Shri Pandurang Vinayak Naik,
   since deceased, through his L.Rs.

2. Smt. Vatsalabai P. Naik.

3. Shri Vinayak P. Naik.

4. Shri Ajit P. Naik.

5. Shri Kamlesh P. Naik.

6. Miss Sunita P. Naik.

7. Shri Parvin P. Naik,
   all r/o House No.93,
   Near BPS Club, Margao,
   Salcete, Goa.

8. Miss Milan S. Borkar.

9. Shri Shashikant S. Borkar,
   r/o Near Metropole Cinema,
   Margao, Goa. ... Respondents.

Shri J.E. Coelho Pereira, Senior Advocate with
Sjri J. Godinho, Advocate for the Appellants.

Shri J. Vaz, Advocate for the Respondents.

CORAM: N.A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 20.08.2004
DATE OF PRONOUNCING THE JUDGMENT: 26.08.2004

J U D G M E N T:

This is defendants' second appeal arising from Civil Suit No.193/81/D/.

2. The paries hereto shall be referred to in the names as they appear in the cause title of the suit.

3. The dispute between the plaintiffs and the defendants is regarding Shop No.5 belonging to the Municipality of which the plaintiff-Pandurang Vinayak Naik was a lessee. The controversy between the plaintiff and the defendants (they claim through Gajanan Babani Borker) is regarding the agreement dated 13.4.74 which both the parties styled as a conducting agreement and by which the said plaintiff-Pandurang V. Naik gave the suit Shop to the said Gajanan Babani Borker on terms and conditions stipulated in the said agreement.

4. The said agreement, as per clause (1) was for a period of seven years commencing from 1.5.1974 and terminable on 30.4.1981. As per clause (7) the plaintiff had agreed to give an option to the said Gajanan B. Borker in case the latter desired to renew the said agreement for a further period of seven years.

However, by letter dated 10.3.1981 (before the expiry of the agreement) the plaintiff informed the said Gajanan B. Borker that he was interested to run the shop and thereby gave a notice of rescision of the said agreement, upon the expiry of the period. The defendant, in turn, replied to the plaintiff by his letter dated 11.3.1981 stating that as per clause (7) of the said agreement he had a right of option in case he so desired to renew the said agreement for a further period of seven years and therefore in terms of clause (7) of the said agreement he desired to renew the said agreement for a further period of seven years from 30.4.74.

5. The plaintiff then sent an Advocate's notice dated 6.5.81 to the defendant stating that the defendant was in arrears of royalty from 1.12.1980 and, as such the agreement dated 30.4.1974 had come to an end in view of the non-payment of the royalty continuously for the period of three months. The plaintiff also informed the defendant that he was a trespasser and therefore he was required to vacate the said shop within 24 hours ... etc.

6. The Suit was filed on 15.6.81. The case of the plaintiff was that the said agreement having come to an end by efflux of time, the said defendant was a

trespasser in the said premises with effect from 1.5.1988 and therefore was not entitled to continue in occupation thereof. The plaintiff also stated that in any event the said agreement was for personal management of the said business by the defendant and the defendant who is a trespasser was not entitled to run the same.

7. On the other hand, it was the case of the defendants that the said agreement was not a leave and licence agreement. The defendants stated that the said Gajanan had approached the plaintiff and expressed to create a sub-tenancy in his favour. The defendants stated that the said Gajanan was the brother of defendants No.1 and 4. The defendants stated that since there was a sub-tenancy, the question of quitting the premises did not arise and now the defendant No.2 was a direct tenant of the said shop by virtue of agreement dated 25.8.82 executed between the defendant No.2 and the said Municipality.

8. By judgment dated 30.10.89, the learned Civil Judge, S.D. came to the conclusion that the agreement was a leave and licence agreement and therefore the defendant/s had failed to prove that he was a sub-tenant. The appeal filed to the District Court was dismissed by the learned Addl. District Judge on

9.4.98.

9. The appeal was admitted on the question which is quite common and that is whether the agreement dated 30.4.1974 is an agreement of leave and licence or an agreement of lease.

10. It has been contended on behalf of the defendants, by Shri Coelho Pereira, the learned senior counsel, that all the clauses of the said agreement clearly show that it was an agreement of sub-lease.

11. On the other hand, Shri J. Vaz, the learned counsel of the plaintiff, has submitted that all the clauses of the agreement show that it was a leave and licence agreement.

12. On behalf of the plaintiff, reliance has been place on the case of **Capt. B.V. D'Souza v. Antonio Fausto Fernandes** [(1989) 3 S.C**.C.,** 574]. This was a case where the agreement was executed between the parties wherein a landlord had inducted the person concerned under an agreement which was styled as leave and license agreement and the plea taken was that the person concerned was a tenant protected by the provisions of the G.D.D. Buildings (L.R.E.) Control Act, 1968, (Act, for short) and it was held that the

terms of the document were not consistent with the case of a licence and the said terms indicated that an interest in the property was created in favour of the said person in pursuance of which he was put in possession with a right of renewal. The Supreme Court held that the surrounding circumstances were also not consistent with the deed being one of lease. The Supreme Court reiterated the principle that for ascertaining whether a document creates a lease or licence, the substance of the document must be preferred to the form and the real test is the intention of the parties – whether they intended to create a lease or licence and if an interest in the property is created by the deed it is a lease but if the document only permits another person to make use of the property "of which the legal possession continues with the owner", it is a licence and if the party in whose favour the document is executed gets exclusive possession of the property, prima facie he must be considered to be a tenant; although this factor by itself will not be decisive.

13. On behalf of the plaintiff, reliance is placed on the case of **Dr. Suresh Madhukar Nagarkar v. Ujubala Madhav Desai and others** (1997 (4) Bom.C.R. 250) wherein it was, inter alia, held that the contention that a long period of ten years shows that

the case is not one of licence, but tenancy was not tenable.

14. On behalf of the plaintiff, reliance was also placed on the case of **Amarjit Singh v. R.N. Gupta** (1995 (4) Bom. C.R. 538), but then it was conceded that the said case was of no assistance to the case of the plaintiff to decide the case at hand.

15. On behalf of the plaintiff, reliance is also placed on the case of **ICICI v. State of Maharashtra & Ors.** (1999 (9) Supreme 360) wherein the Supreme Court held that since clause 2 of the deed expressly sets out that this agreement is not to be construed as a demise in law of the said land so as to give to the licensee any legal interest in the land, the provisions of Art.36 of the Bombay Stamp Act was not attracted to the document.

15. It is by now well settled that exclusive possession by itself is not decisive in favour of a lease and against a mere licence and there could be a case where even exclusive possession might turn out to be a case only of a licence and not a lease where the grantor himself has no power to grant the lease. In the final analysis where a transaction is a lease or a license turns on the operative intention of the parties

and as such there is not a single or simple test to distinguish one from the other. (See A.I.R. 1988 S.C. 1845).

16. In the case at hand neither the attending circumstances nor the intention of the parties show that the agreement between them was a case of sub-lease. The deceased plaintiff as well as his son P.W.2 Vinayak have stated that as the plaintiff was not keeping good health, the plaintiff had agreed to allow the said Gajanan to run the said business in the said shop, a fact which has gone uncontroverted by the defendants. It is an admitted position that the agreement was drafted by one Edwin. It is also an admitted position that the suit shop did not belong to the plaintiff but to the Margao Municipal Council and it is common knowledge which is also otherwise reflected in the agreement subsequently executed between the said Margao Municipal Council and defendant no.2 that the suit shop was not allowed to be sub-let. This is a case where the rent to the Municipality was continued to be paid by the plaintiff in his own name and not only that, the licence obtained to run the said shop from the Civil Supplies Department, under the Shops and Establishments Act, the electricity connection, etc. had continued to be in the name of the plaintiff only, at least until the filing of the

suit by the plaintiff against the defendants. This is also a case where the plea of sub-lease has been belatedly taken by the defendants and therefore this is reflective of its falsity. The deceased Gajanan himself did not take such a plea that the said agreement had created a sub-lease in his favour either in his letter to the plaintiff dated 11.3.1981 (Exh.PW.1/B) or for that matter letter dated 28.4.1981 (Exh.PW.1/D), but on the contrary all that deceased Gajanand had stated was that he was interested in exercising his option to renew the said agreement. This is also a case where the plaintiff chose to terminate the said agreement even before its initial period of completion. In my view, the fact that the agreement was executed for rather long period of seven years was not indicative of a sub-lease. It appears that some people have a wrong notion that a leave and licence agreement has necessarily got to be for a period of eleven months only or else it will be a lease. There is nothing in law to support such a notion. Again, the agreement clearly stipulated, by virtue of clause 15 that the parties agreed that the agreement would not create any right or interest in the said Gajanan (party No.II) in the shop premises or that it would not create tenancy or sub-tenancy in favour of Gajanan (party No.II) and it is for this reason probably that deceased Gajanan did not claim such lease

or sub-tenancy during his lifetime when he wrote the said two letters to the plaintiff. It is nobody's case that the parties had not understood the contents of the said agreement which was signed by both the parties and it is presumed they knew as to what they had agreed to. The Supreme Court in the case of Capt. B.V. D'Souza (supra) had stated that the approach of the Court is to suppress the mischief and advance the object of the Rent Act. These observations were clearly inapplicable to the facts of this case because the provisions of the Act are inapplicable to buildings owned by Municipal Councils. The fact that the plaintiff had given the said shop to be used by the deceased Gajanan along with the furniture belonging to the plaintiff and with a further right to resume possession in case there was a default in payment of royalty for a period of three months would tend to show that the legal possession had remained with the plaintiff. It is true that the plaintiff agreed with the defendant that he was free to run the business under any name which he chose, and this does not show that any interest was created by the plaintiff in the suit premises of which the occupation was given to the deceased Gajanan. On the contrary, clause 9 showed that the furniture and fitting were to be returned to the plaintiff on the expiry of the agreement. In my view the terms of the agreement when read on the whole clearly showed that the parties did

not intend to create a sub-lease in favour of the said Gajanan. The surrounding circumstances in which the said agreement was made also did not show such intention. Moreover, the conduct of the said Gajanan B. Borkar upon the receipt of the notice of termination of the agreement militates against the very plea of sub-lease subsequently and belatedly raised by the defendants (first four defendants being the brothers of deceased Gajanan B. Borkar). The submission that the agreement was a camouflage for the creation of sub-tenancy therefore cannot be accepted.

17. The fact that after filing the suit, Defendant No.2 has got a lease agreement dated 25.8.83 executed with the Margao Municipal Council is of no consequence because of the principle of estoppel enunciated in Section 116 of the Evidence Act. By virtue of the said principle, no person who comes upon any immovable property by licence of the person in possession thereof is permitted to deny the title to such person to such possession of the property. The estoppel continues to operate so long as the licensee or sub-tenant has openly not restored possession by surrender to such person.

18. As a result, I am of the view that the plaintiff's suit was rightly decreed by both the courts

below. Consequently the Second Appeal deserves to be dismissed and is hereby dismissed. The defendants to pay to the plaintiff costs throughout.

N. A. BRITTO, J.

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